



Billing Code 3410-90

DEPARTMENT OF AGRICULTURE

Office of the Secretary

[0503-AA51]

Revocation of Statement of Policy on Public Participation in Rule Making

AGENCY: Office of the Secretary, USDA.

ACTION: Proposed revocation of Statement of Policy; request for comments.

SUMMARY: The U.S. Department of Agriculture (USDA) is proposing to rescind the Statement of Policy titled “Public Participation in Rule Making,” published in the Federal Register on July 24, 1971 (36 FR 13804) that requires agencies in USDA to follow the Administrative Procedure Act’s (APA) notice-and-comment rulemaking procedures even in situations where the APA does not require it. The Statement of Policy implemented a 1969 recommendation by the Administrative Conference of the United States (ACUS), which urged Congress to amend the APA to remove the exemption from the notice-and-comment requirement for rulemakings relating to “public property, loans, grants, benefits, or contracts,” adding that agencies should follow the notice-and-comment procedures pending amendment of the APA.

In proposing to rescind the Statement of Policy, USDA notes that in the more than 40 years since ACUS made its recommendation, Congress has not amended the APA to implement it. Moreover, USDA has determined in this time that the advantages of implementing the ACUS recommendation do not outweigh the disadvantages, such as increased costs and delayed implementation imposed on USDA programs. The proposed change would not result in USDA forgoing notice-and-comment rulemaking for all regulatory actions relating to public property, loans, grants, benefits, or contracts, rather the proposed change would grant USDA agencies the

discretion to determine the appropriateness of notice-and-comment rulemaking for this class of rulemakings.

DATES: Comments must be received no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: You may submit comments, identified by the RIN, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: [RIN0503AA51@obpa.usda.gov](mailto:RIN0503AA51@obpa.usda.gov). Include the RIN in the subject line of the message.

Fax: 202-720-5837.

Mail: Paper, disk or CD-ROM submissions should be submitted to Adam J. Hermann, Esq., General Law and Research Division, Office of the General Counsel, USDA, STOP 1415, 1400 Independence Avenue, S.W., Washington, DC 20250.

Hand Delivery/Courier: Adam J. Hermann, Esq., General Law and Research Division, Office of the General Counsel, USDA, South Building Room 3311, 1400 Independence Ave., S.W., Washington, DC 20250.

Instructions: All submissions received must include the agency name and the RIN. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Adam J. Hermann, General Law and Research Division, Office of the General Counsel, 3311-S, USDA, 1400 Independence Ave., S.W., Washington, DC 20250; Voice: (202) 720-9425; Email: [RIN0503AA51@obpa.usda.gov](mailto:RIN0503AA51@obpa.usda.gov).

## SUPPLEMENTARY INFORMATION:

1. The APA provides generally that, before a rule may be promulgated by a Federal agency, notice of proposed rulemaking must be published in the Federal Register, and interested persons must be given an opportunity to participate in the rulemaking through submission of written data, views, or arguments. See 5 U.S.C. 553(b), (c). However, the APA specifically exempts from these public participation requirements “a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. 553(a)(2).

In 1969, ACUS adopted Recommendation No. 69-8, which recommended that Congress amend the APA to remove the exemption for rulemakings relating to “public property, loans, grants, benefits, or contracts,” and that agencies follow the APA’s notice-and-comment procedures for such rulemakings pending amendment of the APA.

On July 24, 1971, Secretary of Agriculture Clifford M. Hardin published in the Federal Register a Statement of Policy (“Public Participation in Rule Making”) implementing the ACUS recommendation. The document outlined the policy of USDA “to give notice of proposed rule making and to invite the public to participate in rule making where not required by law.” Specifically, the Statement of Policy required that all agencies of USDA follow the public participation requirements of 5 U.S.C. 553(b) and (c) in rulemaking relating to public property, loans, grants, benefits, or contracts, and it further provided that any “good cause” finding under 5 U.S.C. 553(b)(B) will be used “sparingly” and “only where there is a substantial basis therefor.” See 36 FR 13804.

The 1971 Statement of Policy was issued in anticipation of legislative action that would have amended the APA to remove the exemption for such matters, but in the more than 40 years

that have passed since the ACUS recommendation was adopted, Congress has not acted to implement the recommendation. USDA ascribes significant weight to this fact.

2. When USDA issued the Statement of Policy implementing the 1969 ACUS recommendation, USDA anticipated that “[t]he advantages of implementing the [ACUS] recommendation . . . will outweigh any disadvantages such as increased costs or delays.” USDA has since determined that this is not the case, finding that, in many cases, using the APA’s notice-and-comment procedures necessarily delays the implementation of a program without providing a corresponding benefit. For example, Executive Order 12866, section 6(a), generally requires that agencies use a comment period “of not less than 60 days.” When this two-month period is added to the amount of agency staff time needed to prepare a notice of proposed rulemaking and obtain the necessary Office of Management and Budget reviews and clearances pursuant to Executive Order 12866, plus the additional time it takes the agency to review and respond to any comments received, much time has been spent making a proposal to implement a program, rather than implementing it.

Without the 1971 Statement of Policy, an agency may choose to solicit public comment on a proposed rule even where not required to do so by the APA in order to give the public an opportunity to weigh in on matters of great public interest, such as, for example, establishing eligibility requirements for a particular loan program. In this situation, USDA would continue to use notice-and-comment rulemaking to promulgate regulations implementing the program, notwithstanding the APA exemption.

In other cases, an agency may conclude that the public benefit of issuing awards as soon as practicable outweighs any advantage of affording the public a pre-implementation opportunity to comment on program rules. For example, the nature of the program itself, such as certain

USDA loan mechanics, may undercut the need for proposed rulemaking because the general terms of most Federal loan programs are already established through government-wide issuances such as Office of Management and Budget (OMB) Circular No. A-129, Policies for Federal Credit Programs and Non-Tax Receivables. In such cases, the public should not be deprived of timely Federal assistance due to an administratively-imposed regulatory procedure that the APA itself does not require.

Indeed, USDA has found that in many situations, the issuance of proposed rules (or interim rules with requests for public comment) has generated little public interest in the way of formal comments, thus prolonging program implementation without a corresponding benefit.

For example:

- a) The Voluntary Public Access and Habitat Incentive Program, as added by section 2606 of the Food, Conservation, and Energy Act of 2008 (“2008 Farm Bill”), provides grants to State and tribal governments to encourage owners and operators of privately-held farm, ranch, and forest land to voluntarily make that land available for access by the public for wildlife-dependent recreation, including hunting, fishing, and other compatible recreation and to improve fish and wildlife habitat on their land. USDA received 14 comments on the interim final rule, published July 8, 2010 (75 FR 39135). The majority of public comments supported the program, and while the public welcomed the opportunity to comment, they specifically mentioned that they did not want the rulemaking process to delay making the grants. While a small number of public comments opposed the use of Federal funds for this purpose, or otherwise opposed the scope of the program as specified in the 2008 Farm

Bill, they did not provide constructive alternatives to the implementation of the program outlined in the rule. Moreover, the supportive comments that requested clarification on particular terms could have been addressed as part of the Request for Proposals (RFP) process, rather than through the notice-and-comment rulemaking process.

- b) On January 22, 2010, RUS published a proposed rule in the Federal Register (75 FR 3642) to establish the Special Evaluation Assistance for Rural Communities and Households (SEARCH) Program, as added by section 6002 of the 2008 Farm Bill. The SEARCH grant program authorizes the Secretary to make predevelopment planning grants for feasibility studies, design assistance, and technical assistance to financially distressed communities in rural areas with populations of 2,500 or fewer inhabitants for water and waste disposal projects. No comments were received on the regulation text; however, one public comment was received with regard to the information collection and recordkeeping requirements contained in the rule. This comment, which did not result in changes to program, would have been addressed as part of the Paperwork Reduction Act process, rather than through the notice-and-comment rulemaking process.
- c) The Natural Resources Conservation Service (NRCS), on behalf of the Commodity Credit Corporation (CCC), published an interim final rule with request for comment on November 20, 2008 (73 FR 70245) that set forth the policies and procedures implementing the Agricultural Management Assistance Program (AMA). Through AMA, NRCS provides technical and

financial assistance to participants in eligible States to address issues such as water management, water quality, and erosion control by incorporating conservation practices into their agricultural operations. NRCS received four letters containing approximately one dozen comments, which the agency addressed in a final rule published December 8, 2009. The majority of the changes in the final rule were administrative, technical, or corrections to the interim rule, rather than substantive changes made in response to public input.

Except where otherwise required by law,<sup>1</sup> USDA agencies should have the discretion to determine the appropriateness of affording the public an opportunity for notice and comment when promulgating regulations relating to public property, loans, grants, benefits, or contracts involving their programs. The Department's proposal to rescind the 1971 Statement of Policy will not impact what constitutes a "rule" under the APA (see 5 U.S.C. 551(4)), nor will it affect the types of information that are required to be published in the Federal Register (see 5 U.S.C. 552(a)(1)). USDA remains committed to involving the public in the rulemaking process through the issuance of proposed rules where necessary or appropriate.

3. The Department's proposal to rescind the 1971 Statement of Policy acknowledges the reality that the public participates in much of the formulation of agency policies on financial and

---

<sup>1</sup> Revocation of the Statement of Policy will not affect other statutory public participation requirements. For example, section 4(c) of the Food and Nutrition Act of 2008 requires notice-and-comment rulemaking in accordance with the APA for the Supplemental Nutrition Assistance Program. See 7 U.S.C. 2013(c). Additionally, section 22 of the Office of Federal Procurement Policy Act, Pub. L. 93-400, has specific notice-and-comment procedures for the issuance of agency procurement policies, regulations, procedures, and forms. See 41 U.S.C. 1707. Also, section 103(c)(2) of the Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. 105-185, requires the Secretary, when formulating a request for proposals for competitively-awarded agricultural research, extension, or education activity funding, to consider input solicited from stakeholders regarding the prior year's request for proposals. See 7 U.S.C. 7612(c)(2).

transactional programs through means other than by following the daily publication of the Federal Register. The 1969 ACUS recommendation on which the 1971 Statement of Policy was based was adopted at a time when information published in the Federal Register was not widely available elsewhere. Today, information on the implementation of agency programs is widely distributed in a number of ways, including via agency websites and specialized websites such as Grants.gov (<http://www.grants.gov>) and Benefits.gov (<http://www.benefits.gov>), and the public routinely engages the agencies through multiple online channels, including the Open Government Initiative.

USDA remains committed to transparency and to providing timely information to the public. For example, with respect to discretionary awards of Federal assistance, USDA will continue to follow the Office of Federal Financial Management (OFFM) Policy Directive on Financial Assistance Program Announcements (68 FR 37370), which requires Federal agencies to post on the internet, in a standard format, all announcements of funding opportunities under which domestic entities are eligible recipients, as well as the OFFM Policy Directive on use of Grants.gov FIND (68 FR 58146), which requires Federal agencies to electronically post synopses of announcements of funding opportunities under financial assistance programs that award discretionary grants and cooperative agreements, using a standard set of data elements. As discussed above, the Office of Federal Procurement Policy Act separately provides notice-and-comment procedures for agency issuances of procurement policies, regulations, procedures, and forms. General public property regulations are found in the Federal Management Regulation, 41 CFR 102, and USDA will continue to publish on its website the supplemental Agriculture Property Management Regulations (AGPMR) and Departmental directives on property management.



USDA's commitment to transparency and open government is an important part of the Obama Administration's Open Government Initiative, as reflected in the Presidential Memorandum on "Transparency and Open Government" (Jan. 21, 2009) and OMB Memorandum M-10-06, "Open Government Directive" (Dec. 8, 2009). For more information on USDA's efforts as part of the Open Government Initiative, please visit <http://www.usda.gov/open>.

This proposed action has been reviewed under Executive Order No. 12866 and has been determined not to be a "significant regulatory action." This action will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; nor will it have an annual effect on the economy of \$100 million or more; nor will it adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way. Furthermore, it does not raise a novel legal or policy issue arising out of legal mandates, the President's priorities or principles set forth in the Executive Order.

USDA certifies that this action will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. No. 96-534, as amended (5 U.S.C. 601 et seq.).

This proposed action contains no information collections or recordkeeping requirements under the Paperwork Reduction Act, as amended, (44 U.S.C. 3501 et seq.).

---

Thomas J. Vilsack  
Secretary of Agriculture

[FR Doc. 2013-13068 Filed 05/31/2013 at 8:45 am; Publication Date: 06/03/2013]